

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
CRIMINAL SESSION NO. 73 OF 2017**

UGANDA:..... PROSECUTOR

VERSUS

A1: TWAGIRA GEOFFREY

A2: KUBWAYO FRED ACCUSED

BEFORE: HON.JUSTICE EMMANUEL BAGUMA

JUDGMENT

The accused persons were indicted with the offence of murder contrary to sections 188 and 189 of the Penal Code Act, cap 120.

It was alleged that Twagira Geoffrey (A1) and Kubwayo Fred (A2) on the 22nd of May 2016 at Kirasi village, Maddu Sub-county in Gomba District with, malice aforethought unlawfully killed Sabiiti James.

At the end of the prosecution case, A2Kubwayo Fred pleaded guilty through plea bargain and he was convicted and sentenced accordingly. A1Twagira Geoffrey was put on his defence.

Since A1 pleaded not guilty, like in all criminal cases the prosecution has the burden of proving the case against him beyond reasonable doubt. The burden does not shift to the accused person and the accused can only be convicted on the strength of the prosecution case and not because of weaknesses in his defence (see *Ssekitoleko v. Uganda* [1967, EA 531).

The accused does not have any obligation to prove his innocence. By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence with which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt before it can secure his conviction. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its

best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v. Minister of Pensions* [1947] 2 ALL ER 372).

For the accused to be convicted of murder, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

1. Death of a human being occurred.
2. The death was caused by some unlawful act.
3. That the unlawful act was actuated by malice aforethought; and lastly
4. That it was the accused who caused the unlawful death

Death may be proved by production of a post mortem report or evidence of witnesses who state that they knew the deceased and attended the burial or saw the dead body. In the instant case prosecution adduced a post mortem report dated 23RD May 2016 prepared by Olupot Patrick, a Medical Officer of Gombe hospital which was admitted during the preliminary hearing and marked as exhibit PX1. This evidence was supplemented by that PW1 who testified that she saw the body of the deceased dumped at the dam. Having considered the evidence as a whole, and in agreement with the assessors, I find that the prosecution has proved beyond reasonable doubt that Sabiiti James died.

The prosecution had to prove further that the death of Sabiiti James was unlawfully caused. It is the law that any homicide (the killing of a human being by another) is presumed to have been caused unlawfully unless it was accidental or it was authorized by law (see *R v. Gusambizi s/o Wesonga* (1948) 15 EACA 65).

The post mortem report showed that the deceased sustained broken cervical vertebrae due to twisting of the neck which resulted in death. PW1 and PW5, testified that the body of the deceased was dumped in a dam. PW5 also testified that he saw the accused person hit the deceased in the face with a hammer and tied him up. Not having found any lawful

justification for the injuries found on the deceased and the narration of the eyewitness PW5, I agree with the assessors that the prosecution has proved beyond reasonable doubt that Sabiiti James' death was unlawfully caused.

Thirdly, the prosecution was required to prove that the cause of death was actuated by malice aforethought. Malice aforethought is defined by **section 191 of the Penal Code Act** as either *an intention to cause death of a person or knowledge that the act causing death will probably cause the death of some person*. Malice aforethought being a mental element is difficult to prove by direct evidence, it may therefore be deduced from *circumstantial evidence* (see *R v. Tubere s/o Ochen (1945) 12 EACA 63*). It can be inferred from the nature of weapons used in assaulting the deceased, the parts of the body attacked and the intensity of the attack.

PW5 testified that he saw the accused persons hit the deceased in the face and tied him up with a rope. The body of the deceased was discovered dumped in a dam. The post mortem report (PX1) confirms that the deceased had cut wounds on the forehead and injuries at the neck. Considering the part of the body attacked and the state in which the body was found, I have no doubt in my mind that whoever assaulted the deceased had the intention of ending his life. I find, in agreement with the assessors that the prosecution has consequently proved beyond reasonable doubt that Sabiiti James' death was caused with malice aforethought.

Lastly, there should be credible direct or circumstantial evidence placing the accused person at the scene of the crime as an active participant in the commission of the offence. In this case, the accused person denied any participation. He stated that on that fateful day he was at his home with his sister-in-law and that he milked his cows and went to spray them as well. DW2 also testified that she was at home with the accused at his farm on the 22/5/2016 in the morning hours. The burden lies on the prosecution to disprove his defence by adducing evidence which prove that he was a participant in the commission of the crime.

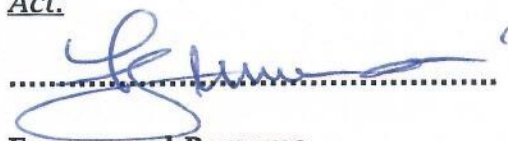
To refute his defence, the prosecution relied on direct and circumstantial evidence.

I am alive of the need to warn myself of the danger of convicting the accused person on the evidence of PW5 as a single identifying witness.

PW5 the eye witness testified that he knew the accused person before this case. He stated that the act happened at 9: 00 am thus there was ample light to recognize the accused person. I am convinced that he was a truthful witness who ably identified the accused person and his testimony was corroborated by circumstantial evidence of PW4 who stated that the accused person went to him for cleansing stating that he had killed a person. PW4 also identified the accused person at the identification parade as the one who went to him for cleansing. Further, PW1 stated that the deceased told her that he had a grudge with the accused person.

I have considered the defence presented by the accused by way of denial of most of the incriminating aspects. Court is tasked to assess the credibility of witnesses on either side from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. The version advanced by the accused is unpersuasive while the prosecution evidence was not discredited by cross-examination and is more credible in the eyes of this court.

In agreement with the assessors I find that there are no other co-existing circumstances which would weaken or destroy the inference that it is the accused person who committed the offence. In the final result, I find that the prosecution has proved all the essential ingredients of the offence beyond reasonable doubt and I hereby find the accused guilty and convict him for the offence of Murder c/s 188 and 189 of the Penal Code Act.


Emmanuel Baguma

Judge

18/4/19